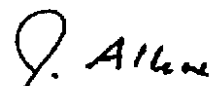


I declare under penalty of perjury that the foregoing is true and correct.

  
\_\_\_\_\_  
Jeffrey Allen  
Vice President of Offer Management for  
Business Markets  
Level 3 Communications, LLC  
1025 Eldorado Blvd  
Broomfield, CO 80020

Executed on July 9, 2009.

# Exhibit 6

D 212885

**NEW YORK STATE THRUWAY AUTHORITY**  
**and**  
**MFS NETWORK TECHNOLOGIES**



**MFS NETWORK TECHNOLOGIES, INC.**

**Agreement for Services Relating**  
**to the**  
**Design, Construction, Marketing**  
**and Maintenance/Operation**  
**of a**  
**Fiber Optic Infrastructure**  
**Along the**  
**New York State Thruway Authority**  
**Rights of Way**

**September 27, 1995**

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- EXHIBIT C** Segments
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- APPENDIX A** Standard Clauses for all New York State Thruway Authority Contracts
- APPENDIX B** Omnibus Procurement Act of 1992 Bid Proposal/Contract Requirements Insertion Clauses
- APPENDIX C** Affirmative Action Program
- APPENDIX D** Omnibus Procurement Checklist to Determine "Reasonable" Effort by Bidders/Contractors for Contracts
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**NEW YORK STATE THRUWAY AUTHORITY**

This AGREEMENT, (hereinafter referred to as "AGREEMENT") made this 9th day of October, 1995, by and between the NEW YORK STATE THRUWAY AUTHORITY (hereinafter referred to as the "AUTHORITY"), whose office is located at 200 Southern Boulevard, Albany, New York (P. O. Box 189, Albany, New York 12201) County of Albany, State of New York and MFS Network Technologies, Inc. (hereinafter referred to as "MFSNT"), whose office is located at Suite 1300, 1200 Landmark Center, Omaha, Nebraska 68102.

**WITNESSETH**

WHEREAS, the AUTHORITY desires MFSNT to perform the services described below and MFSNT agrees to provide these services:

AGREEMENT for Services Relating to the Design, Construction, Marketing and Maintenance/Operation of a Fiber Optic Infrastructure Along the New York State Thruway Authority Rights of Way, and

WHEREAS, the AUTHORITY has available Rights of Way suited to the installation of a fiber optic infrastructure; and

WHEREAS, the AUTHORITY desires to design, construct, market and maintain/operate a fiber optic infrastructure on its Rights of Way; and

WHEREAS, it is substantially more beneficial for such services to be contracted for than performed by AUTHORITY employees due to the requirement for special expertise; and

WHEREAS, MFSNT has been awarded a contract on a competitive basis for the performance of the services listed above; and

WHEREAS, the Board constituting the AUTHORITY approved the terms and conditions of this AGREEMENT pursuant to Resolution Number 4548, adopted at Meeting Number 535, held on June 29, 1995.

NOW, THEREFORE, in consideration of the foregoing and of the mutual covenants herein contained, the sufficiency of which the parties acknowledge, MFSNT and the AUTHORITY hereby agree as follows:

**ARTICLE 1. CERTAIN DEFINITIONS.** For purposes of this AGREEMENT, the following terms are defined:



- Item 1 "Affiliate" shall mean any entity controlling, controlled by, or under common control with another entity.
- Item 2 "Authority Project Manager" shall mean the AUTHORITY designee charged with the management of this AGREEMENT for the AUTHORITY.
- Item 3 "Authority Telesystem" shall mean sixteen (16) fiber optic communication strands and associated electronic equipment as more particularly shown on Exhibit A, attached hereto and incorporated herein by this reference, within the Facilities to be used by the AUTHORITY or its subsidiaries solely for their own purposes. The Authority Telesystem does not include the New York State Government Dedicated Fibers.
- Item 4 "Consent" shall mean entirely within the discretion of the party to either consent or withhold consent, unless such consent may not be unreasonably withheld as more particularly provided in certain sections of this Agreement.
- Item 5 "Construction" shall mean the design, installation, construction and material expansion of the Facilities, New York State Government Dedicated Fibers and the Authority Telesystem; "Maintenance/Operation" shall mean the maintenance, operation, management and non-material expansion of the Facilities and the Authority Telesystem; "Removal" shall mean the permanent removal of any or all of the Facilities; and "Maintenance" shall mean the routine, emergency and preventative maintenance, repair and replacement of the New York State Government Dedicated Fibers, Facilities and Authority Telesystem, but shall not include any activities relating to or necessary to perform "Locates".
- Item 6 "Facilities" shall mean any and all telecommunications cables, lines, conduits, access manholes, pedestals, boxes and other similar equipment and devices owned or installed by MFSNT under this AGREEMENT. Facilities do not include the Authority Telesystem or the New York State Government Dedicated Fibers.
- Item 7 "Gross Revenue" shall mean the total dollar amount billed to Users by MFSNT, and payable to MFSNT from Users in accordance with User Agreements, including User Fees, late fees, interest, and penalties.
- Item 8 "Interest Rate" shall mean the rate of interest established in the AUTHORITY'S Rules and Regulations, 21 NYCRR Part 109.
- Item 9 "Locates" shall mean locating the installed Facilities, New York State Government Dedicated Fibers and Authority Telesystem prior to commencement of other construction projects that may disturb the Facilities, New York State Government Dedicated Fibers or Authority Telesystem.

- Item 10 **"MFSNT Project Manager"** shall mean the MFSNT designee charged with the management of this AGREEMENT for MFSNT.
- Item 11 **"New York State Government Dedicated Fibers"** (hereinafter referred to as **"NYS Fibers"**) shall mean eight (8) fiber optic communications strands within all Segments of the Facilities, to be installed by MFSNT in the same fiber optic cable with the Authority Telesystem, for use by the New York State Office of General Services or its assigns (hereinafter referred to as **"the State"**), solely for New York State government telecommunications applications. The linear footage of the NYS Fibers in any Segment shall be determined by the distance between mileposts in each such Segment as the same are set forth in Exhibit C.
- Item 12 **"Project"** shall mean the construction of the Facilities, NYS Fibers and the Authority Telesystem pursuant to this AGREEMENT.
- Item 13 **"Rights of Way"** shall mean the surface, the areas below the surface and the air space above the surface of the entire highway system owned and/or operated by the AUTHORITY as more particularly shown on Exhibit B, attached hereto and incorporated herein by this reference.
- Item 14 **"Segment"** shall mean an identified portion of the Rights of Way, Facilities, NYS Fibers and Authority Telesystem. The Segments are set forth in Exhibit C, attached hereto and incorporated herein by this reference, and in Exhibit 6.2-1 of MFSNT's Technical Proposal.
- Item 15 **"Site"** shall mean the location of construction activities related to the NYS Fibers, Authority Telesystem and Facilities in the Rights of Way.
- Item 16 **"Target Revenue Threshold"** shall mean the minimum amount of User Fees needed for each Segment of the Facilities, Authority Telesystem and NYS Fibers for which the AUTHORITY and MFSNT have obtained User Agreements, as more particularly set forth in Exhibit D, attached hereto and incorporated herein by this reference.
- Item 17 **"Term"** shall mean the period commencing on the date of this AGREEMENT and ending for each individual Segment exactly twenty (20) years after the date the AUTHORITY has determined the individual Segment to be operational, and has notified MFSNT of such determination in writing (unless sooner terminated in accordance with the terms of this AGREEMENT). Under no circumstances shall this AGREEMENT end more than twenty-five (25) years after the date of this AGREEMENT.

Item 18 "User" shall mean a third party (including without limitation an Affiliate of MFSNT, excluding the State and excluding subsidiary corporations of the AUTHORITY) that executes an agreement with MFSNT, as approved by the AUTHORITY, allowing such party to use the Facilities ("User Agreement").

Item 19 "User Fee" shall mean any reasonable and customary amount payable to MFSNT by a User for the use of the Facilities or a portion thereof under a User Agreement, as agreed by MFSNT and the User, and as approved by the AUTHORITY. User Fees shall not include any amounts received by MFSNT as consideration for the installation of a User's Facilities. This consideration must be a reasonable and customary amount as approved by the AUTHORITY. The User Fee shall include costs for Maintenance/Operation of a User's Facilities. Late fees, interest and/or penalties collected under the User Agreement shall not be considered to be User Fees, but shall be agreed upon in advance by MFSNT and the AUTHORITY. MFSNT and the AUTHORITY shall agree in advance upon a standard User Fee schedule as a basis for determining appropriate User Fees for specific User Agreements. AUTHORITY approval of User Fees shall be granted by the AUTHORITY'S Finance Committee, and notification to MFSNT of such approval shall be made in writing by the Authority Project Manager.

Item 20 "Work" shall mean the design, engineering, Construction and construction management of the Project and the marketing and Maintenance/Operation services performed by MFSNT or its employees, agents, or subcontractors, including but not limited to that Work set forth in Articles 2, 4, 5 and 11 hereof.

**ARTICLE 2.** **GRANT.** The AUTHORITY hereby grants to MFSNT the nonexclusive right, privilege and license for the design, Construction, marketing, Maintenance/Operation and Removal of the Facilities and Authority Telesystem on, under, over, along and across the Rights of Way during the Term subject to the provisions of this AGREEMENT. Except as otherwise provided in this AGREEMENT, MFSNT shall bear the entire cost and expense of all design, Construction, construction inspection, marketing, Maintenance/Operation and Removal of the Facilities and Authority Telesystem, and MFSNT shall indemnify and hold the AUTHORITY harmless therefrom. The AUTHORITY further grants to MFSNT the exclusive right to supply, install and maintain all property owned by Users or by the AUTHORITY which are for use with the Facilities or the Authority Telesystem which will be placed within the Rights of Way during the Term. The AUTHORITY further grants to MFSNT the exclusive right to construct and maintain the NYS Fibers as part of the Work hereunder, such construction to commence upon written notice from the State of the State's intent to install the NYS Fibers as further described in Article 4.

**ARTICLE 3. TITLE TO AND USE OF FACILITIES.**

- Item 1 **Title to Facilities.** Prior to the end of the Term, MFSNT shall be the legal and equitable owner of the Facilities, Authority Telesystem and NYS Fibers. At the end of the Term, provided the AUTHORITY is not in default hereunder, MFSNT shall transfer ownership of the Facilities and Authority Telesystem to the AUTHORITY. At the end of the Term, MFSNT shall ensure that the NYS Fibers are in good repair (normal wear and tear excepted) and shall deliver to the State a Bill of Sale conveying title and ownership of the NYS Fibers to the State, free and clear of all liens and encumbrances including any security interests previously created therein.
- Item 2 **No Property Interest.** Other than as expressly stated herein, this AGREEMENT shall not confer upon MFSNT any ownership or possessory interest in real property owned by the AUTHORITY, and MFSNT agrees that it shall never make any claim of such interest.
- Item 3 **Use by the Authority.** The AUTHORITY may not sublease or sublicense the Authority Telesystem (or any portion thereof) to any third parties. The AUTHORITY reserves the right to use any portion of the Authority Telesystem for internal AUTHORITY (including its subsidiary corporations) purposes.
- Item 4 **Use by MFSNT.** If MFSNT or any of its Affiliates desire to use the Facilities, the AUTHORITY and MFSNT (or relevant MFSNT Affiliate) shall agree on the terms of a User Agreement (including without limitation, a User Fee) governing such use.
- Item 5 **Use by State.** The State may use the NYS Fibers in accordance with the terms of a separate agreement between the State and the AUTHORITY and as described herein. Associated electronic equipment may be located on the Rights of Way to the extent allowed by the New York State Accommodation Plan, Exhibit G, and as approved by the AUTHORITY at the AUTHORITY'S sole discretion, pursuant to a separate agreement between the State and the AUTHORITY, and will be secured separately from the electronic equipment associated with the Facilities or Authority Telesystem. Such equipment that directly connects to the NYS Fibers will include appropriate electronic interface devices (network connection blocks) to ensure the safe operation of the Facilities and Authority Telesystem. The State may use the NYS Fibers for New York State government telecommunications applications only, which use may be assigned to another agency or subdivision of the State pursuant to a governmental reorganization or assignment of functions under which the pertinent functions of the New York State Office of General Services as an agency are transferred to a successor agency or subdivision of the State.

The State may not sublease, sublicense, resell or in any way allow the use of the NYS Fibers (or any portion thereof) to any third parties other than agencies, offices, boards, bureaus, divisions, officers, public authorities or public benefit corporations of the State.

#### **ARTICLE 4. CONSTRUCTION.**

- Item 1 **Scope of Work.** MFSNT shall provide the services, material and equipment required by and described in the Scope of Work, attached hereto as Exhibit E, and in the MFSNT Technical Proposal, attached hereto as Exhibit F and incorporated herein by this reference. Additionally, MFSNT shall install, maintain and repair the NYS Fibers in accordance with the same standards as are applicable to the Authority Telesystem. All Work shall be conducted in accordance with the terms of this AGREEMENT; in accordance with the New York State Accommodation Plan, 17 NYCRR Part 133, attached hereto as Exhibit G and incorporated herein by this reference; and in accordance with all applicable AUTHORITY, State, Federal, local and other laws, rules and regulations.
- Item 2 **Design.** MFSNT shall prepare and submit all design documents for the AUTHORITY'S review and approval as more further defined in Exhibit H, attached hereto and incorporated herein by this reference, and in this Article. MFSNT shall bear the cost of all design work, with the exception of the AUTHORITY'S own internal design review.
- Item 3 **Commencement.** MFSNT may effect Construction of the Facilities, NYS Fibers and Authority Telesystem (or any part thereof) on the Rights of Way only after approval thereof has been expressly given by the Authority Project Manager. The Authority Project Manager shall notify MFSNT in writing of the AUTHORITY'S approval, disapproval or requirement for additional plan review of the proposed Construction of the Facilities, NYS Fibers and Authority Telesystem in the Rights of Way or a Segment thereof within thirty (30) days after delivery by MFSNT to the Authority Project Manager of plans and specifications therefor. MFSNT shall not be obligated nor allowed to commence Construction of any Segment of the Facilities, NYS Fibers or Authority Telesystem unless and until MFSNT and the AUTHORITY determine and mutually agree that Users have committed to enter into User Agreements generating the Target Revenue Threshold for the relevant Segment of the Facilities, NYS Fibers and Authority Telesystem as described in Exhibit D.

At the time that MFSNT and the AUTHORITY mutually agree that Users have committed to enter into User Agreements generating the Target Revenue Threshold for any Segment, written notification thereof will be made to the State by the AUTHORITY. Unless within thirty (30) days of receipt of such notification with respect to any particular Segment, the State notifies MFSNT in writing of the State's intent not to install the NYS Fibers, then MFSNT agrees to construct the NYS Fibers according to the same project schedule as the Facilities and Authority Telesystem. If the State notifies MFSNT that the State does not intend to install the NYS Fibers, then the AUTHORITY and MFSNT will be relieved of all obligations to install the NYS Fibers in that particular Segment.

Should the market at time of Construction indicate a potential for future User Agreements, as determined and mutually agreed by MFSNT and the Authority, an additional two (2) vacant innerducts and a sufficient quantity of dark fiber to satisfy potential Users will be constructed and installed. Such additional fiber and innerduct shall be included in the Facilities.

MFSNT agrees that Construction of the Facilities, NYS Fibers and Authority Telesystem in the Rights of Way shall, to the fullest extent feasible, be done in such locations and in such manner so as not to interfere with existing water, gas, sewer pipe, traffic signal, street light and other utilities and conduits in the Rights of Way, as such locations are approved by the AUTHORITY.

Item 4 **Permits.** Upon the AUTHORITY'S request, MFSNT shall provide copies of all permits, certificates and other approvals required to fulfill MFSNT's obligations under this AGREEMENT. If required, the AUTHORITY shall cooperate with MFSNT to the extent such cooperation is needed to obtain such permits, certificates or approvals.

Item 5 **Risk of Loss.** MFSNT shall bear the risk of loss of all Work respecting each Segment of the Authority Telesystem and NYS Fibers until such Work is delivered to and accepted by the AUTHORITY or the State respectively; provided, however, that the AUTHORITY or the State shall be responsible for any such loss due to the actions or omissions of the AUTHORITY or the State respectively. MFSNT shall bear the risk of loss for the Facilities throughout the Term of this AGREEMENT.

- Item 6 **Performance of Work.** MFSNT shall furnish all design work, engineering work, technical services, labor, supervision, tools, equipment and materials necessary for the performance of the Work in a proper, safe, efficient and skillful manner. MFSNT shall perform the Work in a prompt and diligent manner, so as to promote the general progress of the entire construction. Upon written request by the AUTHORITY, MFSNT shall furnish to the AUTHORITY such evidence (including, but not limited to, performance bonds as described in Article 15) as the AUTHORITY may reasonably require relating to MFSNT's ability to fully perform this AGREEMENT in the manner specified herein.
- Item 7 **Corrections to Work.** Upon written notice by the AUTHORITY to MFSNT, MFSNT shall promptly remove, replace, repair or otherwise correct any portion of the Work respecting the Authority Telesystem or the NYS Fibers that is defective in material or quality of work or that otherwise is not in conformance with this AGREEMENT. MFSNT shall bear all costs of correcting any of its defects or nonconformances under this paragraph.
- Item 8 **Project Schedule.** Immediately after the Target Revenue Threshold is satisfied respecting a Segment of the Facilities, NYS Fibers and Authority Telesystem, MFSNT and the AUTHORITY shall meet and in good faith agree on a project schedule for the completion of Work respecting that Segment. The project schedule shall become a part of the Scope of Work attached hereto. The construction and installation of the Segment shall be completed in accordance with the project schedule. The Facilities, NYS Fibers and Authority Telesystem within the Segment shall be installed and become operational concurrently. MFSNT shall provide to the AUTHORITY detailed construction schedules for each Segment prior to commencement of construction and shall notify the AUTHORITY in a timely manner of any changes to such schedules.
- Item 9 **Inspections.** MFSNT shall provide required construction inspection services at its own cost and expense. The AUTHORITY shall have the right to inspect the Work at all stages and at all times. The AUTHORITY shall bear the cost of its own internal construction inspection activities.
- Item 10 **Acceptance of Facilities, Authority Telesystem and NYS Fibers.** After completion of the NYS Fibers, Facilities and Authority Telesystem in any Segment, MFSNT shall notify the AUTHORITY and the State that the NYS Fibers, Facilities and Authority Telesystem will be tested by MFSNT or an independent tester upon a specified date for compliance with industry standards and with all required specifications including, but not limited to, those described in Section 6.3.8 of the MFSNT Technical Proposal, Exhibit F.



MFSNT shall allow the AUTHORITY and the State to have representatives present at such testing. MFSNT shall then certify to the AUTHORITY and the State in writing that each component meets each and every standard and specification. If the testing fails and/or if MFSNT is unable to provide such certification, then MFSNT agrees to complete corrective remedies for the NYS Fibers, Facilities and Authority Telesystem within fifteen (15) days, and repeat the testing and certification as described herein. The AUTHORITY shall then notify MFSNT in writing within ten (10) days of such certification of whether or not the Facilities and Authority Telesystem are acceptable for use. The State will notify MFSNT directly in writing within ten (10) days of such certification of whether or not the NYS Fibers are acceptable for use. Unless within ten (10) days of receipt of MFSNT's certification, the State notifies MFSNT in writing of the State's intent not to accept the NYS Fibers, then the State shall be deemed to have accepted the NYS Fibers. If the State notifies MFSNT that the State does not intend to accept the NYS Fibers, the State will be provided with an additional ten (10) days to show good cause as to why the NYS Fibers are unacceptable for use. If the State does not show good cause within the additional ten (10) day period, then the State shall be deemed to have relinquished all of the State's rights and obligations related to the NYS Fibers in that Segment. The payment period (as described in Article 10) for the NYS Fibers will begin on the date of the State's written acceptance of the NYS Fibers in each Segment.

Item 11 **Project Manager.** MFSNT shall keep available during the progress of the Work a competent manager who shall be the authorized representative of MFSNT. Directions and communications to MFSNT's Project Manager from the AUTHORITY in connection with the Work shall be treated as directions and communications to MFSNT.

Item 12 **MFSNT Duties.** In connection with the Work, MFSNT shall have the following duties and obligations:

- (A) In the course of the Work, MFSNT shall not damage, harm or destroy any property of the AUTHORITY in and around the Site or any adjacent property, and shall take all necessary precautions for the safety of its employees on, in, or about the Rights of Way and shall comply with all Authority traffic and safety rules and regulations and all applicable federal, state and municipal safety laws and building codes.

- (B) During the course of the Work, MFSNT shall procure any and all permits and licenses of a temporary nature (including the standard AUTHORITY work permit) that are necessary for performance thereof and shall observe and abide by all applicable restrictions and all laws, regulations, ordinances and other rules of the AUTHORITY and any governmental authority having jurisdiction over the Rights of Way or the Work. MFSNT shall in good faith use its best efforts to maximize opportunities for participation of New York State business enterprises as bidders, subcontractors, and suppliers as described in Appendix B, the Omnibus Procurement Act of 1992.
- (C) For the duration of this AGREEMENT, MFSNT employees, its subcontractors and representatives shall pay the standard tolls for travel on the Thruway.

Item 13 **Liens.** MFSNT shall defend and indemnify the AUTHORITY against and hold the AUTHORITY harmless from any and all loss, costs and expenses including, without limitation, attorney's fees and costs, associated with all mechanic's or suppliers liens and claims respecting the Authority Telesystem, the NYS Fibers and the Facilities and shall keep the Rights of Way free and clear of all liens, claims and encumbrances arising from its performance of its obligations hereunder. MFSNT shall obtain Labor and Material Bonds as described in Article 15. This Project shall be declared a public works project.

Item 14 **Changes.** The AUTHORITY and MFSNT may by written change order make changes in, additions to and omissions from, the Work relating to the Authority Telesystem, Facilities and NYS Fibers and MFSNT shall promptly proceed with the performance of the Work with respect thereto as so changed once the AUTHORITY and MFSNT have agreed, in writing, to the change order. The time for performance of the Work shall be equitably adjusted to compensate for increased or decreased time for performance resulting from such changes, additions and omissions. All other changes must be by amendment to this AGREEMENT. Changes to the Facilities which result in additional costs shall be made at the expense of MFSNT. Changes to the Authority Telesystem requested by the AUTHORITY which result in additional costs shall be made at the expense of the AUTHORITY, at a cost to be agreed upon in writing with MFSNT, including incremental Maintenance/Operation costs. Changes to the NYS Fibers requested by the State which result in additional costs will be made at the expense of the State at a cost to be agreed upon in writing with MFSNT, including incremental Maintenance costs.

**Item 15     Site Conditions.**

- (A) MFSNT has inspected the Site where the Work is to be performed and is familiar with the conditions of the Site and agrees that no claim shall be made whatsoever for costs, damages or expenses as a result of the conditions of the Site, except as provided in subsection (C) below.
- (B) MFSNT shall notify the AUTHORITY in writing promptly after MFSNT learns of, and before such conditions are disturbed,  
(1) subsurface or latent physical conditions at the Site differing materially from those indicated in this AGREEMENT and the Scope of Work or (2) unknown physical conditions at the Site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in this AGREEMENT. The AUTHORITY shall promptly investigate the conditions, and if it finds that such conditions exist and that they are likely to cause a significant increase or decrease in the time required for substantial completion of a Segment, then the AUTHORITY and MFSNT shall negotiate in good faith toward an equitable adjustment of the time required for substantial completion under this AGREEMENT. The sole remedy for differing Site conditions shall be an extension of time.
- (C) In the event MFSNT encounters toxic or hazardous materials in the performance of the Work which were not introduced to the Site directly or indirectly by MFSNT, its Affiliates, agents, or assigns, any resulting delays shall be considered to be an event of Force Majeure, and MFSNT shall have no obligation, responsibility or liability with respect to any such materials. If MFSNT, its Affiliates, agents or assigns introduces toxic or hazardous materials to the Site directly or indirectly, MFSNT shall be liable for the removal or remediation of such and for any resulting delays.

**Item 16     Audit Procedures.**

- (A) Records. MFSNT shall maintain true and correct sets of records in connection with the performance of this AGREEMENT and all transactions related thereto and shall retain all such records for a period of not less than six (6) years after completion of the Work. MFSNT shall maintain true and correct sets of records in connection with its accounting, billing and collection of User Fees and its payment of a portion thereof to the AUTHORITY as required hereunder and shall retain all such records for a period of not less than six (6) years after each such transaction or payment.

(B) Right to Audit. The AUTHORITY or its authorized representative may from time to time and upon at least five (5) business days advance notice to MFSNT, make an audit of all records of MFSNT in connection with its accounting, billing and collection of User Fees, its payments to the AUTHORITY hereunder, and all records in connection with its Maintenance/Operation and marketing responsibilities. Such audit may also cover MFSNT's procedures and controls with respect to the costs to be reimbursed and the billing and collection of the User Fees. Any overpayment or underpayment shown by such an audit shall be promptly corrected. Such right of inspection shall exist during the Term of this AGREEMENT and for a period of twelve (12) months thereafter. Annually, MFSNT will provide the Authority with a certified list of Users of the Facilities during the previous year. Such list will include User name, number of fibers/ducts leased, miles leased, period used and contract number under which the User is operating.

All of MFSNT's operational records and Facilities, sufficient to verify the Users of the Facilities, shall be open to inspection and audit by the AUTHORITY or its designated representative at all reasonable times during business hours.

It is understood and agreed that any information obtained by the AUTHORITY pursuant to its audit rights hereunder, shall be held confidential except to the extent required to defend or move any claim of the AUTHORITY in any action or proceeding against MFSNT or the Users arising under or out of this AGREEMENT.

Item 17

Warranties. MFSNT warrants that the Authority Telesystem and NYS Fibers will be of good quality and materials in accordance with the Scope of Work and MFSNT Technical Proposal. MFSNT's sole and exclusive maximum liability under such warranty shall be to repair or replace any defective portion of the Authority Telesystem and NYS Fibers of which MFSNT receives written notice during the term of this AGREEMENT. MFSNT's warranty does not extend to defects caused by acts of God, accident, fire or other hazard, or by any misuse, neglect, alterations, storage, or attempts to repair. MFSNT warrants that equipment meets equipment specifications. The foregoing warranty constitutes the only warranty with respect to the Authority Telesystem and NYS Fibers and is in lieu of all other warranties, written or oral, statutory, express or implied, including without limitation, any warranty of merchantability or fitness for a particular purpose. MFSNT shall not be liable for any incidental, special or consequential damages.

Item 18 **Review of Authority Telesystem Capacity.** During the third year after Construction commences on any Segment of the Authority Telesystem, MFSNT will, at the request of the AUTHORITY, review the Authority Telesystem telecommunications traffic volumes and, with good cause as presented by the AUTHORITY, conduct an analysis of the potential need to change OC3 network electronics to OC12 network electronics in that Segment. After this analysis, if it is determined and mutually agreed by MFSNT and the Authority that changing the electronics to OC12 would have measurable benefit to the AUTHORITY in meeting its telecommunication needs, then these changes will be completed by MFSNT at no charge to the AUTHORITY by the end of the fifth year of operation of the Segment.

During the tenth year after Construction commences on any Segment of the Authority Telesystem, the AUTHORITY and MFSNT will reevaluate the network traffic configuration and projected network growth on that Segment to see if additional fiber capacity would have measurable benefit to the AUTHORITY in meeting its telecommunications needs. If unused dark fiber optic communication strands are available as part of the Facilities and if market conditions allow as mutually agreed by MFSNT and the AUTHORITY, MFSNT will make available up to an additional eight (8) fiber optic communication strands for the AUTHORITY'S use and will maintain/operate the additional fibers in conjunction with the Authority Telesystem. Installation, Maintenance and operation will be provided by MFSNT to the AUTHORITY at no charge.

**ARTICLE 5. MAINTENANCE/OPERATION.**

Item 1 **Performance.** MFSNT shall maintain and operate the Authority Telesystem and Facilities at its own cost and expense, with the exception of utility costs at the AUTHORITY'S buildings. MFSNT shall maintain and operate the Authority Telesystem in accordance with the New York State Accommodation Plan, Exhibit G; Scope of Work, Exhibit E; and the MFSNT Technical Proposal, Exhibit F. MFSNT shall maintain and repair the NYS Fibers in accordance with the New York State Accommodation Plan, Exhibit G; Scope of Work, Exhibit E and in accordance with the same standards as are applicable to the Authority Telesystem as described in the MFSNT Technical Proposal, Exhibit F.

MFSNT may perform Maintenance/Operation on the Facilities and Authority Telesystem only after obtaining any and all permits required by the AUTHORITY and with prior approval of the Authority Project Manager. MFSNT may perform Maintenance or repairs on the NYS Fibers only with prior approval of the State and the Authority Project Manager. To the extent possible, Maintenance/Operation must be conducted from off the Rights of Way. In no event may Maintenance/Operation disturb or block vehicular traffic in the Rights of Way. Maintenance/Operation on the Rights of Way is to be conducted under the supervision of an AUTHORITY official designated by the Authority Project Manager.

The AUTHORITY shall perform, and pay for, any and all activities associated with requests to Locate and mark the location of the Facilities, NYS Fibers and Authority Telesystem, and MFSNT shall have no responsibilities respecting such activity. MFSNT shall be responsible for the accuracy of any as-built drawings and markers supplied by it to assist in the location of the Facilities, NYS Fibers and Authority Telesystem.

Item 2

**Duty to Manage, Maintain and Repair.** During the Term, MFSNT shall manage and maintain the Facilities, the NYS Fibers and Authority Telesystem at all times in good working order and in a safe condition, in conformity with all applicable laws and regulations. If the Facilities, the NYS Fibers or Authority Telesystem are damaged, MFSNT shall repair and replace any components of the Facilities, the NYS Fibers or the Authority Telesystem that require such repair or replacement as soon as practically possible in accordance with the terms of the MFSNT Technical Proposal, Exhibit F. MFSNT shall respond to a request for Maintenance or repair of the Authority Telesystem or the NYS Fibers from the AUTHORITY or the State within two (2) hours. The actual costs of repair and replacement shall be borne by the AUTHORITY only to the extent that the damage is caused by the AUTHORITY'S negligence or willful misconduct. If the State causes through negligence or willful misconduct, damage to the NYS Fibers, the Authority Telesystem or Facilities, the cost of repair of such damage shall be borne by the State.

Fiber  
Hits

Item 3

**Priority for Authority and State Operations.** MFSNT's obligation to maintain and repair the Facilities, NYS Fibers and Authority Telesystem and any activities incidental thereto shall be subordinate to, and shall not conflict with, the AUTHORITY'S rightful use or operation of the Authority Telesystem or with the State's rightful use or operation of the NYS Fibers. In the event that the Authority Telesystem, NYS Fibers and the Facilities require Maintenance or repair, the restoration of the Facilities shall be at all times subordinate to the restoration of the Authority Telesystem and NYS Fibers, unless otherwise agreed in advance by all parties.

**ARTICLE 6.** **REMOVAL.** MFSNT agrees that it may, at its sole cost and expense, effect the Removal of any or all of the Facilities owned by MFSNT from the Rights of Way only with prior approval of the Authority Project Manager, (provided that no such approval shall be required if the AUTHORITY is in default of this AGREEMENT), which Removal shall not terminate this AGREEMENT. Under no circumstances may MFSNT remove any portion of the Authority Telesystem, NYS Fibers or Facilities which if removed will interfere, damage or disturb the use of the Authority Telesystem by the AUTHORITY or the use of the NYS Fibers by the State. MFSNT shall obtain any and all permits required by the AUTHORITY prior to commencing such Removal. The Rights of Way, Authority Telesystem and NYS Fibers shall be restored to a condition approved by the AUTHORITY in advance, at the cost and expense of MFSNT.

**ARTICLE 7.** **RELOCATION.** If the Facilities, NYS Fibers and the Authority Telesystem must be relocated due to the order of any governmental agency or in conjunction with the operational needs of the AUTHORITY, the AUTHORITY shall in consultation with MFSNT, designate a new route within the Rights of Way for the Facilities, NYS Fibers and the Authority Telesystem, and all costs associated with such required relocation that are not paid by a third party shall be paid by the AUTHORITY. MFSNT agrees to perform such relocation at cost (including general and administrative expenses), and shall not include profit.

If MFSNT requests permission to relocate the Facilities, the NYS Fibers and the Authority Telesystem after installation, MFSNT shall be allowed to do so only after receipt of approval from the AUTHORITY. MFSNT shall be responsible for bearing the costs of such relocation.

**ARTICLE 8.** **TERMINATION.**

Item 1 **Written Notice.** This AGREEMENT may be terminated by either MFSNT or the AUTHORITY upon the occurrence of an Event of Default, or upon the consensual agreement of both parties.

Item 2 **Assignment of User Agreements.** In the event this AGREEMENT terminates or expires prior to the termination of the User Agreements, MFSNT shall be deemed to have assigned all of its rights and duties under each and every User Agreement in effect at the time of such termination or expiration to the AUTHORITY or the AUTHORITY'S nominee effective on the date of such termination or expiration.

Item 3 **Payment of User Fees.** Upon the expiration or termination of the AGREEMENT, the AUTHORITY shall be entitled to receive its proportionate share of User Fees earned prior to termination and all User Fees earned after termination, within sixty (60) days of the receipt of such User Fees by MFSNT. MFSNT shall be entitled to retain its proportionate share of all User Fees earned prior to termination.

Item 4 **Default.**

(A) **Events of Default.** The following events shall constitute "Events of Default" hereunder:

- (1) failure of MFSNT to commence construction of at least one (1) Segment of the Facilities, NYS Fibers and Authority Telesystem within one year of executing this AGREEMENT. In the event of such failure, the AUTHORITY may terminate the AGREEMENT within ninety (90) days after the one year period, or grant MFSNT with an additional specified period of time to commence construction;
- (2) failure of MFSNT to make any payment to the AUTHORITY due hereunder within five (5) days of receipt of written notice by the AUTHORITY to MFSNT of such failure;
- (3) failure to observe or perform in any material respect any covenant required to be observed or performed hereunder, other than with respect to payments due, provided such failure continues for thirty (30) days following written notice thereof or, if such failure is not curable within such time, the failure to commence action to cure the same within such thirty (30) days and to pursue such action diligently to completion;
- (4) any representation or warranty made by one party to the other herein proves to be incorrect in any material respect as of the date of the making thereof. The AUTHORITY makes no representation or warranty as to Site conditions; or



(5) either party files a voluntary petition in bankruptcy or either party is adjudicated bankrupt or insolvent, or files any petition or answer seeking or acquiescing in any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any present or future federal, state or other statute, law or regulation relating to bankruptcy, insolvency or other relief for debtors, or seeks or consents to or acquiesces in the appointment of any trustee, receiver, custodian, liquidator or similar official of either party, or makes any general assignment for the benefit of creditors.

(B) **Remedies.** If any Event of Default under this AGREEMENT occurs, and as long as such Event of Default exists the party not in Default shall have the right to (1) terminate this AGREEMENT, (2) cure any Default of the defaulting party to preserve the other party's rights that may be prejudiced as a result of such default, and/or (3) exercise and pursue all other rights and remedies available to it under applicable law. If the AUTHORITY is in default of its rights and obligations hereunder, then, for so long as such Event of Default remains in existence, MFSNT shall retain its license hereunder to ~~own~~ the <sup>operate</sup> Facilities within the Rights of Way and the State shall be deemed to have succeeded to the position of the AUTHORITY hereunder but only with respect to the rights, duties and obligations of the AUTHORITY regarding the NYS Fibers. MFSNT may retain all such User Fees collected by it for so long as the Event of Default remains uncured.

If the AUTHORITY remains in default hereof during the entire Term, then the license granted herein shall be deemed fully paid. If MFSNT is in default of its rights and obligations hereunder, then, for so long as such Event of Default remains in existence, ~~title to the Facilities, the NYS Fibers and Authority Telesystem shall be conveyed to the AUTHORITY, subject to any liens, liabilities, encumbrances or security interests, and~~ the AUTHORITY shall have the right, at its option, to take over for MFSNT's obligations of billing and collection of the User Fees and payments from the State and MFSNT's payment obligations to creditors related to this AGREEMENT. The AUTHORITY may retain all User Fees collected by it for so long as the Event of Default remains uncured. If MFSNT remains in default hereof during the entire Term, then the license granted herein shall be revoked.

(C) **Interest.** In addition to the remedies contained in Section B all liquidated amounts, and all amounts paid by the party not in default to cure any default by the defaulting party as provided in this Agreement, that are not paid when due hereunder shall bear interest at the Interest Rate, accruing from the thirtieth (30th) day after such payment is due until the date such payment is received.